

August 25, 1993

Secretary
Federal Communications Commission
1919 M St., N.W., Room 222
Washington, DC 20036

Re: MM Docket No. 93-201

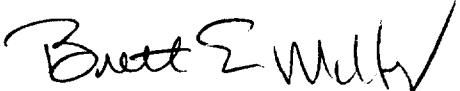
In the Matter of

Amendment of Section 73.202(b) RM 8213
Table of allotments RM 8253
FM Broadcast Stations
Walla Walla and Waitsburg, WA

Dear Sir/Madame:

Enclosed herewith is an original and four copies of Petitioner's Comments in the above referenced Matter. In the event of any questions, please contact the undersigned.

Very truly yours,



Brett E. Miller
11608 Blossomwood Ct.
Moorpark, CA 93021
(805) 523-7312

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)	
)	MM Docket No. <u>93-201</u>
Amendment of Section 73.202(b))	
Table of Allotments)	RM 8213
FM Broadcast Stations)	RM 8253
Walla Walla and Waitsburg,)	
Washington)	

To: Chief, Allocations Branch

PETITIONER'S COMMENTS

Brett E. Miller ("Petitioner"), has before the Federal Communications Commission, a petition for rule making proposing the allotment of Channel 270C3 to Waitsburg, Washington, as that community's first full-time, local, aural transmission service.

("Petitioner") hereby submits the following comments in the above referenced matter. These comments are guided by the allotment criteria set forth in Revision of the FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982), Second Report and Order.

On March 27, 1980, the Commission adopted a Notice of Inquiry and Notice of Proposed Rule Making designed to explore the various aspects of its treatment of proposals to amend the FM Table of Assignments. The Notice proposed to update both the procedures employed as well as the standards used to evaluate proposed changes in the Table.

The FM Table of Assignments was the outgrowth of the rule making proceeding in Docket No. 14185 begun on June 21, 1961 and adopted in 1963 (Third Report, Memorandum Opinion and Order, 40 FCC 747). The FM Table is intended to allow the Commission to meet its obligation under Section 307(b) of the Communications Act to provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them.

The objectives to be served by the FM Table are:

* Provision of some service of satisfactory signal strength to all areas of the country;

* Provision of as many program choices to as many listeners as possible; and

* Service of local origin to as many communities as possible.

The Commission's FM priorities set forth the relative importance of the service to be provided from the perspective of Section 307(b) of the Communications Act. The original priorities were stated as follows:

- (1) Provision for all existing FM stations.
- (2) Provision of a first FM service to as much of the population of the United States as possible; particularly that portion of the population which receives no primary AM service nighttime.
- (3) Insofar as possible, to provide each community with at least one FM broadcast station, especially where the community has only a daytime-only or local (Class IV) AM station, and especially where the community is outside of an urbanized area.
- (4) To provide a choice of at least two FM services to as much of the population of the United States as possible, especially where there is no primary AM service available.
- (5) To provide, in all communities which appear to be of enough size (or to be located in areas with enough population) to support two local stations, two local FM stations, especially where the community is outside of an urbanized area.
- (6) To provide a substitute for AM operation which, because they are daytime-only or suffer service interference at night, are marginal from a technical standpoint.
- (7) Channels unassigned under the foregoing priorities will be assigned to the various communities on the basis of their size, location with respect to other communities, and the number of outside services available.

On May 20, 1982, in its Second and Report and Order, BC Docket No 80-130, the Commission adopted new and simplified priorities as follows:

- (1) First full-time aural service.
- (2) Second full-time aural service.
- (3) First local service.
- (4) Other public interest matters.

In reaching its decision, the Commission concluded that the first

original priority was no longer applicable, as provision had for a long time been made for all existing stations. Additionally, recognition needed to be given to the fact that AM and FM have become joint components of a single aural medium. For some time, the Commission had taken the single aural service concept into account in applying the FM priorities. Anamosa and Iowa City, 46 FCC 2d 520 (1974).

In adopting its new priorities, the Commission reiterated its belief that greatest emphasis needs to be given to assuring the availability of at least one full-time radio service to as many people as possible. The new priority one was adopted for this purpose.

Next in terms of importance are second aural service and first local service. The Commission has given co-equal status to these two priorities. In cases involving a choice between such second aural and first local services, the populations provided each of those services would be compared.

Finally, the Commission believed that it is preferable to employ a single priority for the remaining areas of comparison.

Since these new priorities are used solely to make a choice between proposals, there is no need for a proponent to undertake an engineering study to demonstrate first or second aural service if no choice between proposals is presented.

In addition to the study of FM allocation priorities, the Commission studied its "Reservation Policies" involving preclusion, use of population guidelines, and appropriate class of channel based on the size of the community involved.

Based on the maturation of the FM medium, the Commission decided to end its preclusion policy. Also ended was the apportionment of channels based on the size of the community involved. Although some concern was expressed regarding the impact this latter change might have on localism, the Commission believed that the mature nature of the medium would lead many to seek allocations in smaller communities and, as before, conflicting proposals could still be compared in terms of their 307(b) consequences, and preference given to the smaller community if appropriate.

The Commission ended its policies regarding intermixing classes of channels in the same community stating that the rule making proceeding is designed to further the 307(b) objectives to provide a fair, efficient and equitable distribution of radio service, and that the rule making process is not a suitable one for consideration of economic questions.

Prior to the Second Report and Order, in connection with the request to assign an FM channel to a locality, petitioners had been called upon to show that the proposed location of the channel assignment was in fact a community. This requirement was

terminated with one minor exception: Section 307(b) speaks in terms of distribution of facilities among the "several states and communities" (emphasis added). Section 307(b) requires that the assignments be made to "communities" as geographically identifiable population groupings. For this purpose it is sufficient that the community is incorporated or is listed in the census. However, if a petitioner desires the assignment of a channel to a place that is neither incorporated nor listed in the census reports, it will be required to supply the Commission with information adequate to establish that such a place is a geographically identifiable population grouping and may therefore be considered a community for these purposes.

In rule making, a "Berwick" issue is said to arise when someone proposes the assignment of a channel to a particular community and it appears that the petitioner's real purpose may be to use this suburban location to serve another larger community nearby. Berwick Broadcasting Co., 20 FCC 2d 393 (1969). Based on its decision to drop the population guidelines and to alter the priorities, the Commission stated that it did not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process.

Finally, the Commission reversed its policy of refusing to assign a channel on a showing that it would avoid a hearing over who is to obtain use of a single vacant channel.

Based on the above assignment policies, Petitioner hereby asserts that in the current Matter, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules should be amended to assign Channel 270C3 to Waitsburg, Washington, and that Channel 270A should not be assigned to Walla Walla, Washington.

In support of this assertion, Petitioner offers the following:

1. Consistent with the Commission's FM priorities, the assignment of Channel 270C3 to Waitsburg, WA, would result in that community's first full-time, local aural service.

Although the petition of Walla Walla Christian Broadcasters proposes that the assignment of channels 256A and 270A to Walla Walla, WA, would represent that community's fifth and sixth local commercial FM transmission services, it should be noted that according to Broadcasting Yearbook, there are currently eight stations licensed to Walla Walla, WA, which would make channels 256A and 270A, if assigned to Walla Walla, WA, the ninth and tenth local services. Consideration in this manner is consistent with the Commission's policy of a "single aural service concept" in applying the FM priorities.

Several preceding 47 USCS 307 cases give support to a priority based on local service and local self-expression:

(a) To secure a local station and to show need for it, it is not necessary for applicant to show that programs of clear channel, high power regional, or regional stations, as defined by the Commission, are not satisfactory in service or quality, and where there is overwhelming evidence showing need for local station, and that community is not adequately served locally by any existing station, it is error to refuse application on ground that no local need existed. Courier Post Pub. Co. v Federal Communications Com. (1939) 70 App DC 80, 104 F2d 213.

(b) In 47 USCS 307 comparison, where comparative needs of a community for its first service and needs of community for its ninth service, the community to gain its first service is preferred. Monroe Broadcasting co. et al. (1964) 36 FCC 296.

(c) 47 USCS 307 choice must be governed by relative need of each of competing communities for first local transmission service where conclusion is that no applicant can be preferred on basis of relative need for reception service. Jupiter Associates, Inc., et al. (1965) 38 FCC 321.

(d) In requiring fair and equitable distribution of service, 47 USCS 307(b) encompasses not only reception of adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression. Pinellas Broadcasting Co. v Federal Communications Com. (1956) 97 App DC 236, 230 F2d 204, cert den 350 US 1007, 100 L Ed 869, 76 S Ct 650.

(e) When a community of substantial size is without outlet for local self-expression, there is presumption of need for such outlet under 47 USCS 307(b); thus, when qualified applicant proposes to meet need of this type, presumption will dictate grant in absence of evidence of greater need for existing service to be lost by reason of interference from proposed operation. Salem Broadcasting Co. (1964) 37 FCC 825.

(f) Commission policy to implement intent of Congress expressed in 47 USCS 307 is to afford every community of substantial size, where possible, with outlet for local self-expression. Raul Santiago Roman (1964) 38 FCC 299.

Therefore, in this Matter, the assignment of a first, local, full-time aural service to the community of Waitsburg, WA, should take priority over additional, non-local, ninth or tenth aural service in Walla Walla, WA.

3. Based on the Commission's revised FM assignment policies and procedures in BC Docket No. 80-130, considerations of preclusion, use of population guidelines, and appropriate class of channel are no longer applicable. However, Petitioner proposes that the assignment of a higher Class C3 channel to Waitsburg, WA, represents a more efficient use of available spectrum space than would the assignment of a lower Class A channel to Walla Walla, WA.

4. Based on the Commission's revised FM assignment policies and procedures in BC Docket No. 80-130, considerations of demographics have been terminated which the exception of the definition of "community". The community of Waitsburg, WA, is an incorporated city in the state of Washington, therefore is a cognizable community under Section 307(b).

5. Based on the Commission's revised FM assignment policies and procedures in BC Docket No. 80-130, considerations of so-called "Berwick" issues are not applicable in the rule making process.

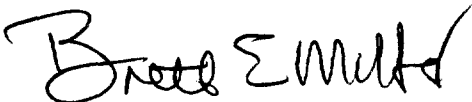
"As to any question about the bona fides of the party involved, we believe that it cannot be effectively resolved in rule making where none of the relevant particulars about the actual use of the channel are available. Also, based on our decision to drop the population guidelines and to alter the priorities, the previous incentive to specify a small community will diminish. In any event, we do not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process." Second Report and Order, 90 FCC 2d 88 (1982).

CERTIFICATION

Petitioner hereby expresses his continued interest in seeing that the channel allotment is made and also confirms his intention and willingness to apply to the Commission for a construction permit to build an FM broadcast station on the requested or assigned channel at Waitsburg, WA.

The undersigned, a United States citizen residing in the State of California at the address indicated below, hereby certifies that the information herein contained is true and accurate to the best of his knowledge and further certifies that the information submitted to the Commission in Petitioner's original petition dated May 6, 1993, was and remains true and accurate to the best of his knowledge.

Respectfully submitted this 25th day of August, 1993,



Brett E. Miller
11608 Blossomwood Ct.
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(805) 523-7312

CERTIFICATE OF SERVICE

I hereby certify that I have, this 25th day of August, 1993, caused a copy of Petitioner's Comments in the Matter of Amendment os Section 73,202(b), Table of Allotments, FM Broadcast Stations (Walla Walla and Waitsburg, WA), MM Docket No. 93-201 (RM-8213 and RM-8252) to be mailed first-class mail, postage pre-paid, to the following:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Ste. 200
Washington, DC 20006
(Counsel for Walla Walla Christian Broadcasters ("WWCB"))



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